11-1800-11946-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of the
Rate Appeal of Hilltop
Good Samaritan Center

ORDER ON CROSS MOTIONS FOR SUMMARY DISPOSITION

This matter is before Administrative Law Judge Barbara Neilson on cross motions for summary disposition filed by Hilltop Good Samaritan Center and the Department of Human Services. Oral argument was heard on December 3, 1999, and the record closed on that date.

Samuel D. Orbovich, Attorney at Law, Orbovich & Gartner, Suite 417, Hamm Building, 408 St. Peter Street, St. Paul, Minnesota 55102-1187, appeared on behalf of Hilltop Good Samaritan Center. Steven J. Lokensgard, Assistant Attorney General, Suite 900, 445 Minnesota Street, St. Paul, Minnesota 55101-2127, appeared on behalf of the Department of Human Services.

Based upon all the files, records and the proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED as follows:

1. The Department of Human Services' motion for summary disposition is granted in part as to its argument that Minn. Stat. § 256B.431, subd. 2b(g), requires that PILOT costs be disallowed to the extent that the costs exceed the amount that a for-profit facility would have paid to a city or township and county for fire, police, sanitation services, and road maintenance costs; the Department's two-step calculation was a logical and reasonable interpretation of the statute; and providers cannot avoid the statutory PILOT cost limitation by entering into their own agreement with local government concerning cost distribution. The Department's motion is otherwise denied.

2. Hilltop Good Samaritan's motion for summary disposition is granted in part as to its argument that the Department was improperly attempting to apply an unpromulgated interpretive rule when it disallowed Hilltop's County PILOT costs based upon the lack of a PILOT agreement with the County or actual payment to the County. Hilltop's motion is otherwise denied.

3. Genuine issues of material fact remain for hearing as to whether the City budget categories relating to "Debt Service" and "Capital Outlay" include

costs attributable to fire, police, sanitation services, or road maintenance costs and whether Hilltop's PILOT costs should be adjusted accordingly.

4. A telephone conference call will be held on Thursday, February 3, 2000, at 10:30 a.m. to set a date for the contested case hearing. The Administrative Law Judge will initiate the conference call.

5. This Order is made for the reasons set forth in the Memorandum below, which is hereby incorporated by reference in this Order.

Dated this 20th day of January, 2000.

BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

Background

Hilltop Good Samaritan Center ("Hilltop") is a non-profit nursing facility. Those operating nursing homes in Minnesota may receive reimbursement from the Department of Human Services for allowable costs incurred in providing care to residents under the federal Medicaid Act, 42 U.S.C. § 1396a, and the State's Medical Assistance Program, Minn. Stat. Chapter 256B. To receive medical assistance payments, nursing homes submit annual cost reports showing costs incurred during the reporting year, which generally runs from October 1 through the following September 30.[1] During desk audits, DHS auditors review the cost reports and supporting documentation.[2] The auditors allow, disallow, or reclassify costs reported on the provider's cost report and, based on adjusted allowable costs, calculate a prospective per diem rate for a rate year running from July 1 through the following June 30.[3] Providers may appeal specific audit adjustments after they receive the final rate notice. If the appeal is not resolved informally, the provider may demand a contested case hearing.[4]

This contested case proceeding involves adjustments that were made during a desk audit of Hilltop for the reporting year ending September 30, 1995 (rate year beginning July 1, 1996). Pursuant to Minn. Stat. § 256B.43, subd. 2b(g), non-profit nursing facilities are allowed to include as operating costs any payments made in lieu of real estate taxes ("PILOT"). But the law limits such payments to the portion of the taxes that the facility would have paid for certain services (fire, police, sanitation, road maintenance) if it were a for-profit facility. Costs incurred by a nursing facility that relate to real estate taxes, or payments made in lieu of real estate taxes, are generally reported on Line 7012 of a facility's cost report, and fall into the Real Estate Taxes and Special Assessments cost category. The issue in this case is whether the decision of the Department of Human Services ("DHS") to disallow a portion of Hilltop's PILOT costs is based upon a permissible interpretation of Minn. Stat. § 256B.431, subd. 2b(g),

consistent with its plain meaning, or whether it is an improper adoption of an interpretive rule. Hilltop seeks $54,088.18 in PILOT costs for the rate year beginning July 1, 1996. DHS argues that the correct allowable amount is $6,407. The burden of proof is on Hilltop to demonstrate by a preponderance of the evidence that the determination of the payment rate is incorrect.[5] Both parties have moved for summary disposition.

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.[6] The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested case matters.[7] A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.[8] The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute that have a bearing on the outcome of the case.[9] When considering a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party.[10] If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.[11]

When Rule 50 was promulgated in 1985, it identified PILOT payments made by non-profit nursing facilities as a nonallowable cost, with certain exceptions for nursing facilities who had entered into written contracts to make PILOT payments prior to June 17, 1985.[12] In 1988, the Legislature enacted legislation that abandoned the previous approach taken under Rule 50 and instead defined PILOT costs paid by nursing homes as an allowable cost, with certain limitations. Minn. Stat. § 256B.431, subd. 2b(g) and its introductory language states in pertinent part:

> Operating costs, after July 1, 1985. (a) For rate years beginning on or after July 1, 1985, the commissioner shall establish procedures for determining per diem reimbursement for operating costs. . . .
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> * * *
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> (g) The commissioner *shall include* the reported actual real estate tax liability or payments in lieu of real estate taxes of each nursing facility as an operating cost of that nursing facility. Allowable costs under this subdivision for payments made by a nonprofit nursing facility that are in lieu of real estate taxes shall not exceed the amount which the nursing facility *would have paid to a city or township and county* for fire, police, sanitation services, and road maintenance costs had real estate taxes been levied on that property for those purposes. . . .

(Emphasis added.)

DHS did not amend Rule 50 following the enactment of Minn. Stat. § 256B.431, subd. 2b(g), to specifically address the PILOT cost limitation. DHS does send an instruction manual each year to each facility required to fill out a Rule 50 cost report.[13] The section of the instruction manual for the reporting year ending September 30, 1995,

relating to how to report payments in lieu of real estate taxes, stated: "Facilities which are nonprofit organizations making payments in lieu of real estate taxes must document the amount claimed. The only amounts allowed are payments for fire, police, sanitation, and road maintenance services. See Attachment J (pg 96) for suggested reporting format and a sample calculation."[14] Attachment J quoted the language of Minn. Stat. § 256B.431, subd. 2b(g), listed the information that must be provided by facilities claiming amounts for payments in lieu of real estate taxes, and set forth a sample calculation of payment in lieu of taxes. Attachment J indicated that facilities must submit information relating to the tax capacity of the facility, the tax capacity rates for fire protection, police, sanitation, and road maintenance, any other information needed to compute the amount paid in lieu of real estate taxes, and a "signed statement from "the County Assessor, City or Township Clerk, and County Auditor verifying the amounts used for the tax capacity and the tax capacity rates for the four services are correct."[15]

A sample certification form was included in Attachment J.[16] The sample calculation of the payment in lieu of taxes shows that the tax capacity of the facility is to be determined by (1) multiplying the market value of the facility by its tax capacity percentage to arrive at the facility's tax capacity; (2) adding the tax capacity rates for fire protection, police, sanitation, and road maintenance to reach a total capacity rate; and (3) multiplying the facility's tax capacity by the total tax capacity percentage rate to arrive at the maximum payment in lieu of real estate taxes that would be allowable. The DHS auditing checklist did not explain in any detail how its auditors should calculate the PILOT cost limitation. The checklist merely stated: "Adjust R.E. Taxes/Payments in Lieu of Taxes (line #7012) to the amount shown on the current year's tax statement. Before disallowing the taxes for lack of a tax statement call the facility and let them know that we have not received the statements yet."[17]

Facts and Arguments of the Parties

On September 30, 1992, Hilltop entered into a PILOT agreement with the City of Watkins in connection with its assumption of a lease to operate a nursing home facility in the City. The City required Hilltop to enter into a PILOT agreement as a prerequisite to approval of the capitalized lease.[18] Under the agreement, which was only with the City of Watkins and not with Meeker County,[19] Hilltop agreed to pay the City of Watkins fees equivalent to the amount of all taxes that could be charged by all government units if Hilltop were a for-profit corporation.[20] The agreement expressly provided that Hilltop would continue to be responsible for the payment of these fees to the City regardless of whether Hilltop was eligible for reimbursement for these fees under state, federal, or other reimbursement funding programs.[21]

For the July 1, 1994, and July 1, 1995, rate years, DHS allowed on desk audit nearly all of Hilltop's PILOT costs.[22] For the July 1, 1996, rate year, however, the DHS desk auditor allowed only $17,679 of Hilltop's claimed PILOT costs. In connection with the Department's desk audit for the July 1, 1996, rate year, Hilltop submitted a copy of a letter from the Meeker County Auditor's Office indicating that, if Hilltop were a for-profit facility, it would be responsible for $54,088.18 in real estate taxes.[23] The letter broke down these taxes as follows:

County	$14,912.14
County Wide	82.16
City	16,865.13
School	21,618.02
Watershed	126.76
Market Value Referendum - School	483.97
Total	$54,088.18

DHS auditor Gary Johnson called the Meeker County Auditor during the desk audit and was informed that 4.53561% of the county's budget was for road and bridge work. So, Mr. Johnson multiplied the total amount of taxes that would go to the county ($14,912.14) by 4.53561% and allowed $676.36. Mr. Johnson was informed by the City of Watkins that the entire $16,865.13 of city taxes went to fire, police, ambulance, and road maintenance. So, Mr. Johnson allowed the entire amount of city taxes. Mr. Johnson also allowed the $82.16 in "County Wide" taxes and the $126.76 for "Watershed" taxes as immaterial amounts, for a total amount of $17,750. From this amount, Mr. Johnson subtracted $71 for physical therapy costs[24] to arrive at $17,679 as Hilltop's maximum allowable PILOT costs.

After Hilltop appealed the $17,679 amount allowed on desk audit, DHS reevaluated the figures and determined that the actual amount that should have been allowed as PILOT costs was $6,407, rather than $17,679. DHS based its new calculation on the fact that Hilltop's PILOT agreement was with the City of Watkins only. Hilltop had no PILOT agreement with Meeker County and made no payments to Meeker County.[25] Based on this information, DHS decided that only the portion of real estate taxes that would go to the City of Watkins for services identified in the statute was allowable under the general cost principles set forth in Rule 50.[26] Consequently, DHS decided that it was inappropriate to allow the $676.36 in county costs that had previously been allowed on desk audit. Moreover, based on additional information from the City of Watkins it received during the appeals process concerning the use of its property tax revenue, DHS concluded that only 37.99% of the $16,865.13 in city taxes actually went to the four statutorily identified services. The information DHS received from the City on the use of its property tax revenue indicated that its money was spent on the following services:

General Government	$ 12,787.57
Public Safety (Fire, Police, Ambulance)	27,779.71
Public Works (Roads, Sanitation)	17,553.03
Culture and Recreation	8,850.97
Urban and Economic Development	4,722.57
Miscellaneous	6,498.78
Debt Service – Principal	14,668.68
Debt Service – Interest	17,828.02
Capital Outlay	8,652.67
Total	$119,342.00[27]

DHS determined that only the Public Safety and Public Works categories included the services specifically identified by Minn. Stat. § 256B.431, subd. 2b(g). Combined, the two figures for these categories amount to 37.99% of the entire city budget. Based on this information, DHS concluded that Hilltop should be allowed only 37.99% of the $16,865.13 claimed as city taxes. As a result, DHS determined that Hilltop should be allowed only $6,407 in PILOT costs rather than the $54,088.18 it reported.[28]

Hilltop argues that DHS was required to promulgate a rule to implement Minn. Stat. § 256B.431, subd. 2b(g), because the provision is found in a section which requires the Commissioner of Human Services to "establish procedures for determining per diem reimbursement for operating costs. . . ." Yet, DHS never adopted a rule establishing procedures for calculating allowable PILOT costs. Hilltop asserts that the the Department's failure to promulgate procedures as required by the statute should render its disallowance invalid. Hilltop contends that the statute is ambiguous and subject to more than one interpretation. This is demonstrated by the fact that DHS applied the statute one way for July 1, 1994, and July 1, 1995 rates, the desk auditor interpreted it a different way in the rate notice under appeal, and DHS urges a third procedure in this case. Hilltop also emphasizes that yet another approach was taken in an audit involving another facility, Ren-Villa, in which DHS apparently considered city budget expenses for capital improvements and debt service costs relating to fire, police, refuse, and public works services. In contrast, the DHS excluded from Hilltop's claimed costs the City of Watkin's "capital outlay" and "debt service" budget categories.

Hilltop contends that, by disallowing its PILOT costs, DHS is applying an unpromulgated interpretive rule that adds more prerequisites to the enabling statute. Hilltop further contends that DHS has in effect modified the PILOT cost limitation to require a separate PILOT agreement with both the City of Watkins and Meeker County in order to claim County costs that are related to road or police protection, even though the statute does not require separate agreements. Hilltop argues that a fair reading of the statute permits a facility to have a single PILOT agreement with one entity and claim allowable fees equal to the amount that would have been collected by all taxing entities for the cost categories. It asserts that the statute does not require that providers secure companion PILOT agreements from the county. Hilltop points out that it knows of no nursing home that has a PILOT agreement with a county because it is municipalities and not counties that generate revenue bonds that provide the rationale for the demand for PILOT agreements.[29]

Because the statute is ambiguous and DHS failed to promulgate a rule establishing the procedures for calculating PILOT costs, Hilltop argues that the Department's disallowance should be reversed. In addition, Hilltop contends that the DHS may not reject its desk auditor's conclusions to further reduce the recognized costs after Hilltop filed its appeal. It asserts that the Department does not have the authority to issue a new or revised desk audit amount after appeal, and argues that the only recourse available to the Department if it wishes to increase the adjustment is to conduct a field audit.

In response, DHS maintains that rulemaking is not necessary because the method it used to calculate the maximum allowable payment in lieu of real estate taxes is consistent with the plain language of the statute and is a reasonable extension and

interpretation of the plain statutory language. The Department points out that an agency is not required to promulgate a rule when its practice is consistent with the plain language of the statute.[30] Because the governing statute does not envision allowing a tax-exempt nursing facility to have allowable PILOT costs equal to the full amount the facility would have paid if it were required to pay real estate taxes, the Department asserts that it was appropriate to limit Hilltop's PILOT costs as it did.

According to DHS, administering the statute requires a simple two-step process. First, it is necessary to determine how much the facility would have paid had real estate taxes been levied on the property. The DHS relies upon the certification of officials indicating the nursing facility's tax capacity (i.e., how much it would have been required to pay in real estate taxes). Next, it is necessary to determine how much of this total amount would go toward "fire, police, sanitation services, and road maintenance costs." Again, the Department relies upon the certification of a city or county official that gives the tax capacity rates for these four services. The Department argues that these are reasonable and reliable methods for obtaining the information.

The Department emphasizes that Hilltop's PILOT agreement was with the City of Watkins only and no portion of its payments went to Meeker County. DHS argues that, in order to comply with the general cost principles contained in Rule 50,[31] DHS should include only that portion of real estate taxes that would go to the City of Watkins for services. DHS thus asserts that Hilltop should not be allowed to pay the City for services provided by Meeker County, and urges the Administrative Law Judge to determine that the amount allowed on desk audit should be adjusted downward to $6,407. The Department contends that the general cost principles set forth in Rule 50 require that a facility pay "what a prudent and cost conscious business person would pay for the specific good or service in the open market in an arm's length transaction" and argues that Hilltop's PILOT agreement with the City, under which it paid $54,088.18 (almost half of the City's entire budget and far more than the $16,865 that the City would have received from Hilltop in 1996 if it were a for-profit facility) does not comport with those principles.

DHS argues that Hilltop has not offered an alternative method for administering Minn. Stat. § 256B.431, subd. 2b(g), that comports with the statute. The Department also stresses that Hilltop has never provided it with any information showing what percentage of the Watkins' city budget for "Debt Service – Interest" or "Capital Outlay" is spent on the four allowable service costs identified in the statute (fire, police, sanitation services, and road maintenance costs.) Because Attachment J is only a "suggested reporting format," the Department acknowledges that local officials are permitted to use different formats to provide the required information. The Department asserts that the difference in outcome in the Ren-Villa desk audit was merely a result of the fact that more detailed information was available to DHS about the City of Renville's budget. Finally, the Department contends that the Commissioner should be permitted to make an adjustment downward following a contested case hearing to correct an error made during desk audit and points out that there is nothing in Minn. Stat. Chapter 256B that precludes such an approach.

Discussion

As a threshold matter, the Administrative Law Judge has determined that it is appropriate to allow the DHS to argue during the course of this contested case proceeding that the amount allowed on desk audit should be adjusted downward. The Department's argument is based upon additional information it received during the appeals process from the City of Watkins on the use of its property tax revenue and its determination that the desk auditor made an error in allowing payment for services that would be provided by the County. The facility has the burden of proof to show that the desk audit adjustment was incorrect. Here, the Department agrees that the adjustment was incorrect and has offered its own competing view of what the appropriate adjustment should be. It makes sense to permit the Department to seek during a contested case proceeding to correct an error that it believes occurred during the desk audit, rather than insisting that the Department be locked into defending the desk auditor's conclusions. The Administrative Law Judge is obligated to review the arguments and make a recommendation to the Commissioner regarding the correct adjustment, so it is logical and necessary for the Judge to have the benefit of each party's position on what that adjustment should be, even if their positions have changed over time.

In the instant matter, the question to be determined is whether the Department's disallowance of Hilltop's PILOT costs is based upon a permissible interpretation of Minn. Stat. § 256B.431, subd. 2b(g) consistent with its plain meaning, or the improper adoption of an interpretive rule. The term "rule" means "every agency statement of general applicability and future effect . . . adopted to implement or make specific the law enforced or administered by that agency."[32] Rules must be adopted in accordance with the rulemaking requirements of the Minnesota Administrative Procedure Act.[33] An agency interpretation that "make[s] specific the law enforced or administered by the agency" is an interpretive rule that is valid only if promulgated pursuant with the Minnesota Administrative Procedure Act.[34] But if the agency's interpretation of a statute corresponds with its plain meaning, or if the statute is ambiguous and the agency interpretation is a longstanding one, the agency is not deemed to have promulgated a new rule.[35] Conversely, if the agency's interpretation has not been consistently applied in the past, a court may cite this as an important factor and find it to be an invalid interpretive rule.[36]

The governing statute in this case states at the beginning of subdivision 2b that the Commissioner "shall establish procedures for determining per diem reimbursement for operating costs."[37] A number of lengthy provisions follow, including item (g), which addresses PILOT costs. That provision specifies that the Commissioner *shall* include, as operating costs, the *reported* PILOT costs of a nonprofit nursing home facility. These costs, however, are limited to the amount the nursing home *would have paid to a city or township and county for fire, police, sanitation and road maintenance services had real estate taxes been levied on that property for those purposes*. DHS has never adopted rules establishing procedures for determining PILOT costs, but it has included certain information and sample forms in the instruction manual issued to providers for use in filing their cost reports.

It clearly would have been preferable if the DHS had promulgated a rule concerning PILOT costs. If a rule had been proposed and a sufficient number of public

requests for a hearing on the proposed rule had been received, there would have been an opportunity for public comment and Administrative Law Judge review regarding the need for and reasonableness of the proposed rule and the Department's statutory authority to adopt the rule. A formal rule would have ensured that facilities and cities would have adequate notice of the approach that the DHS would use in reviewing PILOT costs and what accounting procedures they should have in place to keep track of allowable costs. However, the language of subdivision 2b(a) of the statute requiring the Commissioner to establish procedures for determining per diem reimbursement for operating costs is general in scope, does not appear in the item addressing PILOT costs, and cannot in any event reasonably be construed to mandate that the Commissioner promulgate rules addressing each and every provision contained in the subdivision. In addition, as Minnesota courts have recognized, "[I]f the agency has failed to promulgate a rule according to MAPA [Minnesota Administrative Procedure Act] procedures, but has correctly interpreted a statute, the agency action may still be upheld if the agency action was otherwise proper."[38] Accordingly, the Department's failure to promulgate a rule to implement subdivision 2b(g) does not, in itself, invalidate the disallowance made by the Department. If the DHS was merely applying the plain and unambiguous provisions of the statute, the disallowance must be upheld.

It is evident that the DHS has reached different results, perhaps due to varying levels of scrutiny, with respect to Hilltop's PILOT costs over the years. The PILOT costs claimed by Hilltop were allowed in the two desk audits prior to the one at issue in this case, and the Department has urged a further reduction in the allowable costs during the course of this appeal. These different outcomes do not, however, stem from ambiguity in the statute itself. The statute makes it clear that PILOT costs are allowable only with respect to the four specified services. It also makes it clear that the allowable costs are limited to the amount that the facility would have paid for those services if it were required to pay taxes and had been taxed for those purposes. It is clear from the budgets of the City of Watkins and Meeker County that money is spent on services other than fire, police, sanitation services, and road maintenance costs. Accordingly, it would not be proper under the statute for the Department to allow the entire $54,088 amount claimed by Hilltop. Although the statute does not specify the precise approach to be used by the Department in reviewing claimed PILOT costs (i.e., the statute does not specify that it is necessary to consult public officials with whom the PILOT agreement was reached and ascertain the percentages of that entity's budget that flow to the four services, and apply that percentage to the overall PILOT payment to arrive at allowable costs), that method is a logical interpretation of the statute. Therefore, the approach taken by the Department to first determine how much the facility would have paid had real estate taxes been levied on the property by reviewing the certification of public officials, and then determine how much of this total amount would go toward "fire, police, sanitation services, and road maintenance costs" is a logical and reasonable interpretation of the statutory provision. It also appears from information obtained in discovery by counsel for Hilltop that the Department has analyzed the cost reports of other facilities claiming PILOT costs in the same manner as the desk audit in the present case, and thus has taken a fairly consistent approach with respect to this two-step calculation (despite the fact that the Department's desk auditors in earlier years apparently missed the issue with respect to Hilltop).

In contrast, the Department's argument on appeal that the portion of Hilltop's real estate taxes that would have gone to the County should be disallowed because no payment was actually made to the County is a new interpretation that is at odds with the statute and must be disapproved. Nothing in the statute requires a separate PILOT agreement with each governmental entity. Instead the plain words of the statute provide that the amount of allowable PILOT costs is based on what the nursing home "would have paid" to a "city or township *and* county" (emphasis added) for the four services had real estate taxes been levied on that property for those purposes. The statute does not require that payment actually be made to each governmental entity or that there be a PILOT agreement with each entity before costs will be allowed. The Department's interpretation that payment must actually be made to the county in order for the cost to be allowed is inconsistent with the plain meaning of the statute. Given the language of the statute, it would not make sense to use the "prudent buyer" provision set forth in Rule 50's general cost principles to preclude consideration of the costs that "would have been paid" to the County if Hilltop were a for-profit facility. Moreover, this interpretation by DHS is new and does not reflect long-standing interpretive policy. Accordingly, the Department's disallowance of Hilltop's reported county PILOT costs based on the lack of a PILOT agreement with the County or actual payment to the County is invalid and constitutes improper unpromulgated rulemaking.

The remaining issue is whether it was appropriate for the Department to disallow all costs Hilltop paid to the City of Watkins except for that portion of the city budget making up the Public Works and Public Safety categories. DHS contends that only these two categories include the four services identified and allowed by statute. Hilltop maintains that the entire $54,088.18 it reported in PILOT costs went directly to the City of Watkins' general fund for the four services identified by the statute. That is, despite the breakdown of City expenditures obtained by DHS, Hilltop contends that none of the monies Hilltop paid to the City of Watkins went to parks or schools or other non-allowable services. Accordingly, Hilltop argues that the entire $54,088.18 it reported in PILOT costs should be allowed. In support of its claim, Hilltop has submitted correspondence from the Watkins' City Attorney to DHS staff clarifying that all monies received from Hilltop went to benefit the general operation of the City.[39]

The Administrative Law Judge is persuaded that, pursuant to the plain language of the statute, Hilltop's allowable PILOT costs are determined by what it would have paid for fire, police, sanitation and road maintenance services were it a for-profit facility that were taxed for these services. Even if the agreement between Hilltop and the City of Watkins provided that all of the money paid by Hilltop would go to the services identified by statute, Hilltop is still only entitled to claim the costs it *would have paid* for these services if it were a for-profit facility. In other words, the statute looks at how much a nursing facility would have paid for these services if real estate taxes had been levied on the property for those purposes, not how much the facility has agreed to pay for these services in a contract with the municipality. A nursing facility cannot avoid the statutory PILOT cost limitation by entering into its own agreement with the local government. Costs associated with "General Government," "Urban and Economic Development" or "Culture and Recreation" services, for example, appear to fall outside the four services identified by statute. No additional information was provided by Hilltop or the City showing that covered services were in fact encompassed within these

categories. Consequently, the percentage of Hilltop's total reported costs reflecting these services was appropriately disallowed by DHS. Moreover, because this disallowance is consistent with the statute's plain meaning, it is authorized by the statute itself and the fact that no rule was adopted does not render the disallowance invalid.[40]

With respect to the other cost categories disallowed by DHS, however, such as "Debt Service" and "Capital Outlay," the Judge finds that genuine issues of material fact exist as to whether these categories include costs attributable to the four identified services. While DHS asserts that Hilltop has not provided sufficient evidence regarding the amounts paid by the City of Watkins for debt service or capital improvements relating to the four allowable services, DHS never promulgated a rule alerting providers that such data should be maintained and reported to claim all allowable PILOT costs and did not include a request for such information on Attachment J. Prior to discovery conducted in connection with this case, Hilltop was not aware that other providers had been allowed to claim costs associated with debt service or capital improvements in the four areas recognized by the statute. It thus has not had an adequate opportunity to provide supporting information relating to this issue. It appears that the City of Watkins in fact incurred debt service and/or capital improvement costs that would fall into these areas, in light of the information contained in the July, 1997, letter sent to DHS by the Watkins City Attorney which indicated that the City's general fund serves as a source for purchases and new capital expenditures such as fire trucks, police cars, and other police and fire equipment.[41] A hearing should be held to determine the amount of allowable costs in the Debt Service and Capital Outlay categories relating to the four services covered by the statute.

Hilltop has also raised an equal protection argument challenging the distinction made between tax-paying for-profit nursing facilities and non-profit facilities paying PILOT fees under Minn. Stat. § 256B.431, subd. 2b(g). Its argument stems from the fact that DHS recognizes the full amount of real estate taxes paid by for-profit facilities, regardless of whether the tax is for police, fire, sanitation, roads, schools, public parks, recreation, or general government, but limits the amount of allowable PILOT costs for non-profit facilities to those paid for police, fire, sanitation, and roads. The Department argued in response that there are reasonable distinctions in the purpose, character, and overall operation of non-profit and for-profit nursing facilities that justify different treatment. The Administrative Law Judge does not have the jurisdiction to declare a statute unconstitutional.[42] Such a claim must be directed to the judicial branch.

In summary, neither party is entitled to a full grant of summary disposition. Genuine issues of material fact remain for hearing regarding whether the City budget categories relating to "Debt Service" and "Capital Outlay" include costs attributable to fire, police, sanitation services, or road maintenance costs and whether Hilltop's PILOT costs should be adjusted accordingly.

B.L.N.

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[1] Minn. R. 9549.0041, subp. 1.

[2] Minn. R. 9549.0020, subp. 19, and 9549.0041.

[3] Minn. R. 9549.0041, subps. 11, 13.

[4] Minn. Stat. § 256B.50, subds. 1b, 1h.

[5] Minn. Stat. § 256B.50, subd. 1c(d).

[6] *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1995); *Louwgie v. Witco Chemical Corp*., 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. Rules, 1400.5500K; Minn.R.Civ.P. 56.03.

[7] *See* Minn. Rules 1400.6600 (1998).

[8] *Illinois Farmers Insurance Co. v. Tapemark Co*., 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Minnesota Department of Public Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984).

[9] *Thiele v. Stitch*, 425 N.W.2d 580, 583 (Minn. 1988); *Hunt v. IBM Mid America Employees Federal*, 384 N.W.2d 853, 855 (Minn. 1986).

[10] *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. App. 1984).

[11] *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250-251 (1986).

[12] Minn. R. 9549.0036(CC).

[13] Orbovich Aff., Ex. 1 (Answers to First Interrogatories) at 2-3.

[14] DHS Ex. A at 120.

[15] *Id*. at 121.

[16] *Id*. at 122.

[17] DHS Memorandum, Ex. 143; see also Ex. 141.

[18] The facility was owned by the City but had been operated under a lease by Good Neighbor, a for-profit nursing home organization that was acquired by Good Samaritan. Affidavit of Dennis Anderson at 1-3, 5.

[19] Stipulation of Fact at 7.

[20] Specifically, the PILOT agreement provided that Hilltop would pay the City of Watkins "fees for the use of services, including fire, ambulance, and police protection provided by the City of Watkins" in an amount equivalent to "the amount of general real estate taxes or ad valorum taxes of all political subdivisions . . . that would have been assessed . . . if said premises were owned by a 'for profit' business corporation." Stipulation of Fact, Ex. 1.

[21] Stipulation of Fact, Ex. 1 at p. 2.

[22] In those years, DHS allowed Hilltop's PILOT costs, less a portion for therapy services. Stipulation of Fact at 8.

[23] Orbovich Aff. Ex. 4, DHS 26, 29, 33, 34.

[24] Hilltop does not dispute the disallowance of physical therapy costs.

[25] Stipulation of Fact at 3-6 and Ex. 2.

[26] DHS Memorandum in Support of Summary Disposition at 11.

[27] Stipulation of Facts Ex. 2; Orbovich Aff. Ex. 4; DHS 35-37.

[28] Stipulation of Fact at 5 and Ex. 2.

[29] Affidavit of D. Anderson.

[30] *Mapleton Community Home, Inc. v. Minnesota Dept. of Human Services*, 391 N.W.2d 798, 801 (Minn. 1986) (*citing Cable Communications Board v. Nor-West Cable Communications Partnership*, 356 N.W.2d 658, 667 (Minn. 1984)).

[31] Minn. R. 9549.0035, subp. 8 (1997), requires that costs incurred by a nursing facility satisfy five general principles, including requirements that the cost be what a prudent business person would pay for the service and the cost be for goods or services actually provided in the nursing facility.

[32] Minn. Stat. § 14.02, subd. 4 (1998).

[33] Minn. Stat. § 14.05, subd. 1 (1998).

[34] *Mapleton Community Home, Inc. v. Minnesota Dept. of Human Services*, 391 N.W.2d 798, 801 (Minn. 1986).

[35] *Cable Communications Bd. v. Nor-West Cable Communications Partnership*, 356 N.W.2d 658, 667 (Minn. 1984).

[36] *Wenzel v. Meeker County Welfare B*d., 346 N.W.2d 680, 683-684 (Minn. App. 1984).

[37] Minn. Stat. § 256.431, subd. 2b(a).

[38] *Dullard v. Minnesota Department of Human Services*, 529 N.W.2d 438, 445 (Minn. App. 1995), *citing St. Otto's Home v. Department of Human Services*, 437 N.W.2d 35, 43-44 (Minn. 1989).

[39] Orbovich Aff. Ex. 4 DHS 43-45 (July 8, 1997 letter from K. Dahl).

[40] *Mapleton*, 391 N.W.2d at 801.

[41] Orbovich Affidavit, Ex. 4, at DHS 44.

[42] *Neeland v. Clearwater Memorial Hospital*, 257 N.W.2d 366, 369 (Minn. 1977); *In re Rochester Ambulance Service, a Div. of Hiawatha Aviation of Rochester*, 500 N.W.2d 495, 499-500 (Minn. App. 1993).